STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PULLMAN POLICE OFFICERS GUILD, Complainant,	)	CASE 16177-U-02-4134
vs.	)	DECISION 8086-A - PECB
CITY OF PULLMAN, Respondent.	)	DECISION OF COMMISSION

Garrettson Goldberg Fenrich & Makler, by *Steven Schuback,* Labor Representative, for the union.

Thomas F. Kingen, City Attorney, for the employer.

This case comes before the Commission on appeal filed by the employer, seeking to overturn the decision issued by Examiner Sally B. Carpenter.[1] The Examiner's decision is AFFIRMED.

BACKGROUND

The facts stated in the Examiner's decision are incorporated by reference. We repeat some basic facts for the benefit of persons reading this decision.

On November 19, 2001, the employer's police chief issued a notice to all police supervisors and to the union president, stating: "Effective immediately, no tape recordings will be made by either

[1] *City of Pullman,* Decision 8086 (PECB, 2003).

party on any internal investigation." The union objected to the directive; the employer did not alter its position, but offered to bargain the matter. The employer then proposed to incorporate the chief's position into the police department's policy manual.

The union filed an unfair labor practice complaint with the Commission on January 14, 2002. A preliminary ruling issued on February 15, 2002, found a cause of action to exist on allegations summarized as:

> Employer refusal to bargain in violation of RCW 41.56.140(4)[and derivative "interference" in violation of RCW 41.56.140(1)], by its unilateral change in the tape recording of internal investigation interviews, without providing an opportunity for bargaining.

A hearing was held on October 22, 2002, before Examiner Carpenter. In her decision issued on May 30, 2003, the Examiner ruled "the employer committed an unfair labor practice by unilaterally changing, and refusing to bargain with the union about, a mandatory subject of bargaining." The employer filed a timely appeal, and both parties filed appeal briefs.

POSITIONS OF THE PARTIES

The employer disputes the union's claim that a routine practice of tape recording internal investigation interviews existed over a period of years, and also argues that the tape recording of investigative meetings is not a mandatory subject of bargaining. It asserts that investigatory interviews are private conversations, so that tape recording without the consent of all parties would violate state law. In addition, the employer contends that written statements, rather than tape recordings, are both more accurate

records of investigatory interviews and offer more protection for employees taking part in the interviews.

The union asserts that the employer committed an unfair labor practice by making a unilateral change in working conditions. The union contends it has been the practice to tape record internal investigation interviews for at least the past 10 years, and that the chief's announcement banning any future tape recording, without first notifying the union and bargaining the decision, amounts to a refusal to bargain on a mandatory subject of bargaining.

DISCUSSION

Standard of Review

The Commission does not conduct a de novo review of Examiners' decisions in unfair labor practice proceedings under Chapter 391-45 WAC. Rather, we review the findings of fact to which error is assigned in a notice of appeal,[2] to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and order. *See Curtis v. Security Bank*, 69 Wn. App. 12 (1993); *Cowlitz County*, Decision 7007-A (PECB, 2000).

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991), cert. denied, 503 U.S. 986 (1992). Substantial evidence may be less than a preponderance of the

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[2] Unchallenged findings of fact are treated as verities on appeal. *City of Bellingham*, Decision 7322-B (PECB, 2002).

evidence, but must be more than a mere scintilla of evidence. *Black's Law Dictionary* (6th ed. 1991), at 996-97.

Assignments of Error

The employer's notice of appeal assigned error to most of the Examiner's findings of fact and conclusions of law.[3] The employer also assigned error to the Examiner's Order.

Assignment of Error 1: Finding of Fact 3 -
The Examiner wrote:

> 3. The employer and union were parties to a collective bargaining agreement which did not regulate recording of investigatory interviews of bargaining unit employees.

The employer argues that the parties' collective bargaining agreement specifies that the police chief has the authority to change, modify, or delete existing policies, and that the chief has the authority to implement new policies and procedures. The employer states that the parties understood that management was in control of internal investigations. The employer reasons that this is substantial evidence that the collective bargaining agreement gives authority to the chief to authorize or prohibit tape recordings in internal investigations.

The parties' collective bargaining agreement contains no explicit reference to tape recording of internal investigation interviews.

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[3] The employer does not contest those findings of fact and conclusions of law regarding the employer's status as a public employer, the union as the exclusive bargaining representative, and the Commission's jurisdiction over this case.

While the employer may have felt confident about the matter, it is evident that the employer's inference from or interpretation of the contract was not manifest to the union. Indeed, the union responded to the chief's directive by promptly filing the complaint to initiate this unfair labor practice proceeding. Applying contract interpretation principles, the Examiner then declined to read in terms and conditions that are not contained within the four corners of the parties' contract. The Examiner correctly concluded that the parties' collective bargaining agreement does not explicitly address the issue of the tape recording of internal investigation interviews.

Assignment of Error 2: Finding of Fact 4 -
The Examiner wrote:

> 4. For at least ten years prior to November of 2001, the union and employer agreed to tape record internal investigation interviews on an ad hoc basis.

The employer contends that tape recording was not a consistent practice, that the employer never agreed to tape record administrative or internal investigations, and that the employer had control over the interviews and thus could make the decision on whether to record interviews. The employer cites Commission precedent as the legal authority for its contention that no past practice on tape recordings existed.[4]

The Examiner correctly placed the focus of attention by stating that the employer's argument concerning the consistency of the tape recording practice "ignores what is actually at issue here: The

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[4] The employer cites *City of Burlington,* Decision 5840 (PECB, 1997); and *Whatcom County,* Decision 7288-A (PECB, 2002).

chief's directive imposing a fixed practice (i.e., absolutely no tape recording) in place of a vacuum (i.e., tape recording upon ad hoc consent) could give rise to a duty to bargain." The Examiner correctly concluded that there was no general policy against tape recording investigatory interviews. The record shows that a succession of sergeants had tape recorded internal investigation interviews on numerous occasions over a period of several years,[5] just as there were times when interviews were not tape recorded. There was no written or oral employer policy regarding tape recording, and decisions about recording were made on a case-by-case basis or, in the Examiner's words, on an "ad hoc" basis.

This record supports a conclusion that these parties "got on well together" until November 19, 2001.[6] The parties had not bargained, or even informally discussed, this issue. Indeed, it had never arisen as a point of contention prior to November 19, 2001. Like many other unwritten practices on which a duty to bargain can exist prior to a unilateral change, tape recording of investigatory interviews had become a component of the parties' relationship.

The Commission joins the Examiner in concluding that this employer views past practice too narrowly, incorrectly cites a grievance arbitration standard for what constitutes a past practice, and misinterprets the Commission's decisions defining past practice in collective bargaining settings. The Examiner properly found that the union had a reasonable expectation that it could continue to

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[5] One sergeant testified that he had tape recorded interviews over a period of 10 years until the chief imposed the challenged directive in 2001.

[6] To "get on well together" is one of the alternative definitions of the word "agree" in the *Oxford American Dictionary*, Oxford University Press, 1980.

tape record the interviews on the same ad hoc basis used for several years.[7]

Assignment of Error 3: Finding of Fact 5 -
Assignment of Error 4: Finding of Fact 6 -

These issues are inter-related in both the Examiner's decision and the employer's appeal brief, so we address them together. The Examiner wrote:

> 5. Investigatory interviews are fact-finding procedures that focus on the conduct of individual employees within the bargaining unit represented by the union, and can lead to disciplinary action, including suspensions which affect the wages and hours of such employees and discharges which affect the wages, hours and tenure of such employees.
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> 6. The bargaining unit employees subject to the investigatory interviews described in paragraph 5 of these findings of fact, and the union as their exclusive bargaining representative, have a substantial interest in accurately recording and preserving the matters discussed in such investigatory interviews for the purposes of potential filing and processing of grievances under the parties' collective bargaining agreement.

The employer's arguments on this appeal differ from those it made at the hearing in this matter, and even from those made in its brief to the Examiner.[8] In its appeal brief, the employer's main emphasis is that it has determined (in the exercise of its claimed

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[7] The employer also side-steps (and the Commission need not address) the issue of whether the union would have a right to record an investigatory interview, even if the employer chooses not to record the session.

[8] The employer's position earlier was that RCW 9.73.030 requires the consent of all participants prior to recording any private communication, and that RCW 9.73.030 allows the chief to withhold his concurrence to the tape recording of investigatory interviews.

prerogative to determine the most effective fact-finding method in investigatory interviews) that sworn statements are more accurate than tape recordings.[9]

Under its new emphasis, the employer attempts to re-frame this controversy as involving an "essential management prerogative" of deciding which method to use to collect facts for its decision-making process, and asserts that tape recording is not a mandatory subject of bargaining. The employer asserts that procedures at the investigative stage are pre-disciplinary, that the employer only

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[9] While the employer takes issue with the Examiner's drawing of a distinction between investigatory interviews and bargaining meetings, we do not address that claim. The employer did not assign error to Finding of Fact 7, where the Examiner wrote:

> The investigatory interview[s] described in paragraphs 5 and 6 of these findings of fact are factually distinguishable from collective bargaining negotiations and grievance meetings, where a free exchange of proposals is encouraged and the duty to bargain in good faith exists.

Citing *Okanogan County*, Decision 2252-A (PECB, 1986) and *National Labor Relations Board v. Weingarten,* 420 U.S. 251 (1975), the employer's appeal brief nevertheless asserts that the Examiner's aligning investigatory interviews with trials or arbitrations contravenes precedents holding that investigatory interviews are not adversarial proceedings.

For the benefit of parties who might cite or seek to distinguish the Examiner's decision in future cases, we point out that the Examiner in this case merely stated that investigatory interviews are *"more like"* trials and arbitrations than negotiations. We acknowledge that investigatory interviews lack the cross-examination and other adversarial procedures inherent in trials and arbitrations, but an employee who must answer questions under threat of discharge is hardly in the same position as an employee engaged in negotiations, or even one involved in the grievance process. In that context, we find the Examiner's statement to be reasonable.

collects facts, and that the employer has not even decided to rely on the collective bargaining disciplinary procedure. Citing *Latrobe Steel Co.*, 630 F.2d 171, 176 (1980), the employer contends that a ban on verbatim recording aids the free flow of information, and that "statements made on to a tape recorder are difficult to change and can be misinterpreted" while "a written or verified document is a better way to conduct internal investigations because the officer has the power to edit the document." The employer also contends that "investigative interviews are a subset of the broader category of internal investigations ranging from commendation to discipline . . . ." and states a concern that the presence of a tape recorder lends a formality to the interview that has a chilling effect on the person being interviewed.

The Examiner found that the employer conducts internal investigations whenever there is an allegation of misconduct by a law enforcement officer, including union members. Those investigations provide for fact-finding, to determine the employee's intent (or lack thereof) and whether the employee's actions were reasonable. They also provide for employees to consult with an attorney and/or a union representative, and to be informed of their rights under *Garrity v. New Jersey,* 385 U.S. 493 (1967).[10] The Examiner correctly held that this level of inquiry is directly related to employee wages, hours, and working conditions. *See City of Spokane,* Decision 5054 (PECB, 1995) and *City of Yakima,* Decision 3503-A (PECB, 1990). The Examiner then analyzed whether tape recording of disciplinary procedures can constitute a mandatory subject of bargaining.

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[10] Under *Garrity,* the employer that requires an employee to answer questions concerning the employee's conduct under threat of discharge, cannot thereafter use any statements given in a criminal investigation.

Although no case law was cited or found directly addressing tape recordings in investigatory interviews, the Examiner cited cases holding that investigatory interviews are not bargaining sessions,[11] and that investigatory interviews have the potential to affect an employee's wages, hours, and working conditions.[12] The Examiner aptly distinguished the investigatory interview from contract negotiations and grievance meetings, where the purpose is to negotiate.[13] The employer's attempt to soften the import of investigatory interviews is not persuasive. The issue here is not about fact-finding that results in commendations, but fact-finding that can result in suspension or termination of employment.

Privacy -

The employer's argument against correlating tape recordings with discipline is based upon privacy concerns. The Examiner noted that the Supreme Court of the State of Washington has ruled that Chapter 41.56 RCW prevails over conflicting statutes.[14] Absent a specific legislative action, parties must bargain over matters that are mandatory subjects under Chapter 41.56 RCW, even if they read some other statute to point in a different direction.[15] The Washington legislature has neither required nor prohibited tape

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[11] The Examiner noted case law concluding that verbatim recording of collective bargaining and grievance meetings is not a mandatory subject of bargaining. *See, e.g., Latrobe Steel Co.,* 630 F.2d 171, 176 (1980); *Pennsylvania Telephone Guild,* 799 F.2d 84 (1986); *Nabisco Brands, Inc.,* 272 NLRB 1362 (1984). *See also National Labor Relations Board v. Weingarten,* 420 U.S. 251 (1975).

[12] *Nabisco, supra,* at 1364.

[13] *Pennsylvania Telephone Guild,* supra, at 88.

[14] *Rose v. Erickson,* 106 Wn.2d 420 (1986).

[15] *See Mason County,* Decision 3108 (PECB, 1989), *aff'd,* Decision 3108-A (PECB, 1989).

recordings in investigatory interviews related to employee discipline (a mandatory subject of bargaining). The Examiner was correct in finding that the privacy statute relied on by the employer does not trump the duty to bargain a mandatory subject.

Best method of recording interviews -

The employer argues that a ban on tape recording actually protects employees. The union's witnesses uniformly testified that tape recording is the most accurate way to preserve a statement, and is preferred by the bargaining unit members. The interference aspect of this case becomes clear at this point: The employer seeks to usurp the union's role in representing the bargaining unit employees. The scenario most likely to produce a conflict would be where the union wanted to tape record an interview and was denied. Under the employer's theory of the case, a union argument that tape recording is the most accurate record of an interview and best protects its members would be met with a response that the employer believes written statements are most accurate and better protect its employees. The Examiner was correct in finding the employer's initial argument (citing privacy concerns) to be without merit. In advancing its current argument, the employer has strengthened the union's position: Not only is the argument without merit, it provides dispositive evidence of an unfair labor practice intent.[16]

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[16] The Commission does not allow parties to advance issues on appeal that could have been considered in proceedings before Examiners. *King County,* Decisions 6291-A through 6294-A (PECB, 1998). Although the employer provided testimony supporting this theory at the hearing, it was neither its original reason for prohibiting tape recordings, nor the reason it emphasized at the hearing and in its closing brief. As a result, the Examiner's decision did not analyze the "best method" argument. The employer cannot now claim error on appeal, when the Examiner was not aware that this defense was at issue.

Assignment of Error 5: Finding of Fact 8 -

The Examiner wrote:

> 8. On November 19, 2001, without prior notice to the union, the employer's chief of police issued an order which was effective immediately, and which prohibited any tape recording of investigatory interviews of bargaining unit employees.

In its appeal brief, the employer acknowledges ". . . the Guild had tape recorded internal investigation interviews in the past and that on or about November 19, 2001, Chief Weatherly ordered that internal investigations could no longer be tape recorded [footnote omitted]." By acceding to that fact, the employer negated its assignment of error.

Assignment of Error 6: Conclusion of Law 2 -

The Examiner wrote:

> 2. On the basis of paragraphs 5 and 6 of the foregoing findings of fact, tape recording of investigatory interviews is a mandatory subject of bargaining under RCW 41.56.030(4).

The employer argues that if a "preliminary matter" like a tape recording is found to be mandatory subject of bargaining, then any element of an investigative interview could be a mandatory subject. The employer contends that if the employer and union cannot agree "it forces all employer pre-disciplinary interviews to stop while the subject is negotiated or if agreement cannot be reached, arbitrated."

Paragraphs 5 and 6 of the Examiner's findings of fact have been analyzed, and have been found valid by the Commission. Once again, the employer strengthens the union's position. Leaving aside the

question of what sorts of "preliminary" matters could "force" the suspension of investigative interviews, the employer demonstrates an impatience with the collective bargaining process that lends credence to the gravamen of the union's complaint: The employer instituted a unilateral change in the investigative interview process without bargaining it. Thus, the conclusion of law is found to be without error.

Assignment of Error 7: Conclusion of Law 3 -

The Examiner wrote:

> 3. By its unilateral implementation of a prohibition against tape recording of investigatory interviews as described in paragraph 8 of the foregoing findings of fact, in place of the ad hoc practice described in paragraph 4 of those findings of fact, the employer presented the union with a fait accompli and failed and refused to bargain in violation of RCW 41.56.140(4), and thereby also interfered with employee rights in violation of RCW 41.56.140-(1).

The employer admits it did not offer to bargain prior to its decision of November 19, 2001, and only offered to bargain the matter after the fact. The Examiner accurately set forth the law on unilateral changes of wages, hours, and working conditions.[17] The Examiner correctly found the belated offer to bargain did not absolve the employer of having committed an unfair labor practice.[18]

Assignment of Error 8: Order -

The Commission takes this to mean the employer objects to the entire Order, since the employer's brief does not identify any

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[17] *See NLRB v. Katz,* 369 U.S. 736 (1962); *City of Kalama,* Decision 6773-A (PECB, 2000).

[18] *City of Bremerton,* Decision 7873 (PECB, 2002).

specific parts of the Order that the employer finds objectionable. The Commission finds the Order reasonably results from the findings of facts and conclusions of law, and conforms to Commission precedent for orders in unfair labor practice cases.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Orders issued by the Examiner in the above-captioned matter are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Orders of the Commission.

Issued at Olympia, Washington on the 17th day of December, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner